

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

C. JAN GREGG,

Appellant/Cross Respondent,

v.

STATE OF WASHINGTON, DEPARTMENT  
OF SOCIAL & HEALTH SERVICES  
("DSHS"), WESTERN STATE HOSPITAL, a  
division of DSHS, DENNIS BRADDOCK,  
Secretary of Department of Health & Human  
Services, in his individual and official  
capacities, TIMOTHY BROWN, Assistant  
Secretary of Department of Health & Human  
Services, in his individual and official  
capacities, KARL BRIMNER, Director of  
Mental Health Division, Western State  
Hospital, in his individual and official  
capacities, JACK MORRIS, Assistant Director  
of Mental Health Division, DSHS, in his  
individual and official capacities,

Respondents/Cross Appellants.

No. 32895-0-II

UNPUBLISHED OPINION

ARMSTRONG, J. -- C. Jan Gregg appeals a summary judgment dismissing her sex discrimination, hostile work environment, retaliatory termination, and defamation claims. Gregg failed to produce evidence that the Department of Social and Health Services created a pervasive hostile work environment or that the Department terminated her in retaliation for protected

conduct or because of her sex. Accordingly, we affirm.

### FACTS

The Department of Social & Health Services (Department) hired Gregg to be Chief Executive Officer (CEO) of Eastern State Hospital (Eastern) in 1996.

Three-and-a-half years later, Pat Terry, acting director of the Department's mental health division, hired Gregg as CEO of Western State Hospital (Western). Tim Brown, the assistant secretary for the Department's health and rehabilitation services administration,<sup>1</sup> approved Gregg's appointment. The Department paid Gregg the same salary it had paid her male predecessor at Western. Shortly after Gregg transferred to Western, the Department hired Karl Brimner to fill the director of mental health division position on a permanent basis; Brimner thus became Gregg's supervisor.

Western is one of the largest and most complex psychiatric hospitals in the United States. When Gregg started her job, Western was dealing with several major problems. Among them, Western's former CEO had placed the hospital's medical director on home assignment while the health department investigated allegations of patient abuse. This forced Gregg to appoint a temporary medical director.

Additionally, less than a year into Gregg's tenure, the Nisqually earthquake destroyed an entire building on the Western campus. Because of the damage, Gregg had to close two hospital wards and redistribute 68 patients. Shortly thereafter, Brimner ordered Gregg to close several more wards and eliminate 270 staff positions.

During her first year at Western, Gregg's superiors had few criticisms of her performance

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<sup>1</sup> The health and rehabilitative services administration is one of seven administrations within the Department and is the administration that oversees Western.

as CEO. While she was CEO, Medicare twice certified the institution and the Joint Commission for Accreditation of Health Care Organizations (JCAHO) accredited the hospital. These certifications and accreditations were essential for federal reimbursement for hospital services.

In late 2001, in light of statewide budget concerns, Assistant Secretary Brown focused on how his divisions handled Washington Management Service (WMS) positions.<sup>2</sup> Brown and his staff developed and distributed procedures for CEOs to follow in granting employee salary raises and appointing employees to WMS positions. Soon, however, Brown noticed irregularities in Western's salary increases and WMS appointments.

In response to numerous problems with the WMS system, Dennis Braddock, the head of the Department, froze salary increases for all WMS positions at the agency. The Department distributed the memo internally and all appointing authorities were aware of it. After the salary freeze, Brown's staff discovered hospital records showing that some Western employees received raises despite Braddock's directive. In addition, Western had given salary increases greater than five percent, which violated the Department's policy requiring Brown to approve raises of five percent or more for all WMS employees. Brown also noticed that Western had many more "double filled" WMS positions than other institutions and that Western paid numerous WMS employees' salaries above the agency-authorized range. Clerk's Papers (CP) at 123.

To address the WMS problems, Brown issued a memo to Brimmer stating that "all internal WMS actions regarding appointments [and] salary increases . . . require[d] [Brown's] approval."

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<sup>2</sup> A WMS position is a management position. Each institution budgets a certain number of WMS positions in its bi-annual budget. An institution can have more managers than there are WMS positions through a process called "double-filling." Double-filling means that more than one person holds the same position title, although each person performs different functions within the institution. A hospital may need to double-fill to comply with a Medicare or JCAHO recommendation necessary for certification/accreditation.

CP at 485. This memo effectively terminated Gregg's and Brimner's WMS position-appointing authority. Brown then personally approved WMS appointments for six months; Gregg never regained autonomy with respect to WMS issues.

During her tenure, Gregg implemented several policies to improve Western's efficiency and to meet certification and accreditation requirements. Based on a JCAHO recommendation, she banned smoking on Western's campus. Although the mental health division directors agreed that the non-smoking policy was a good idea, they were unhappy with some of the plan's practical results that Gregg had apparently not anticipated. Gregg also changed Western's organizational structure in an attempt to improve the hospital's efficiency. Gregg's superiors at the mental health division approved her reorganization plan but grew impatient with her inability to successfully implement it.

In March 2003, a Western employee filed a sexual harassment case against the Department and Western, alleging that a co-worker, Barrette Green, had subjected her to sexual harassment and retaliation. When the trial started, Green was Western's risk manager. Gregg did not appoint Green; but she recommended his appointment.

In 2002 and early 2003, Brimner and Brown began to question Gregg's management of Western; they had concerns with her leadership ability, her management of WMS appointments, and her failure to report critical incidents to the mental health division. Brown, Brimner, and Braddock discussed the need for new leadership at Western and decided to terminate Gregg's appointment.

On July 24, 2003, Brimner told Gregg that she could either resign or be terminated. Brimner explained that they would consider her for other jobs, but he did not specify the positions available or their salaries. At the time, Gregg

expressed no interest in a different position. Several months after her termination, Gregg wrote Brimner asking whether the agency had other positions available. Brimner replied that he would be willing to discuss employment opportunities for Gregg within the agency as long as she understood that none would pay a salary as high as her CEO salary.

For several weeks after her termination, the media reported the story that Green had allegedly sexually harassed women at Western for several years. Many of the articles mentioned Gregg's name in a manner implying that she was at least partially responsible for allowing sexual harassment in the workplace.

After Gregg's termination, Brown wanted to ensure that the Department recruited the most qualified person for the CEO position. Accordingly, the mental health division conducted a national survey and concluded that they would have to offer at least \$110,000 per year to attract qualified CEO candidates to lead Western. Two acting CEOs, first a male and then a female, filled the vacancy left by Gregg's termination while the mental health division recruited and eventually hired Andrew Phillips to fill Western's CEO position. The male interim CEO received the same salary that Gregg had received. Phillips started at \$120,000 per year.<sup>3</sup>

Gregg sued the Department, Western, Brown, Brimner, and Jack Morris, the assistant director of the mental health division, alleging: hostile work environment; sex, ethnic origin, and age discrimination; retaliation; conspiracy; false light; defamation; deprivation of liberty rights; negligent infliction of emotional distress; and aiding and abetting. The Department moved for and the trial court granted summary judgment on all 11 of Gregg's causes of action. Gregg appeals the trial court's rulings on her claims for gender discrimination, sexual harassment,

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<sup>3</sup> Gregg received \$90,000 per year.

retaliation, and defamation.

## ANALYSIS

### I. Standard of Review

We review a summary judgment de novo. *Korshund v. Dyncorp Tri-Cities Servs., Inc.*, 156 Wn.2d 168, 177, 125 P.3d 119 (2005). Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. CR 56(c). In testing the propriety of a summary judgment, we consider all facts in the light most favorable to the nonmoving party. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005) (citing *Atherton Condo. Apartment Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990)). The nonmoving party may not rely on speculation, argumentative assertions, or conclusory statements. *Seattle Police Officers Guild v. City of Seattle*, 151 Wn.2d 823, 848, 92 P.3d 243 (2004) (citing *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986)); *Overton v. Consol. Ins. Co.*, 145 Wn.2d 417, 430, 38 P.3d 322 (2002).

### II. Sex Discrimination - Disparate Treatment

Gregg claims that her superiors treated her differently than her male counterparts on numerous occasions. Specifically, she claims that (1) her superiors removed her authority to appoint key personnel, micro-managed her, and subjected her work and conduct to heightened scrutiny; (2) after terminating her, the agency did not offer her another position within the agency as it customarily did for white males who were removed from their positions; (3) the agency refused to grant her a salary increase during her tenure but offered her successor a significantly larger salary; and (4) although the agency micro-

managed her, it gave her successor, Andrew Phillips, complete autonomy to run the hospital.

Where an employee lacks direct evidence of discrimination, she must establish a prima facie case to prevail on a summary judgment motion. *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 180, 23 P.2d 440 (2001) (citing *Kastanis v. Educ. Employees Credit Union*, 122 Wn.2d 483, 490, 859 P.2d 26 (1993), 865 P.2d 507 (1994)). To establish a prima facie case of sexual discrimination based on disparate treatment, an employee must show that (1) she belongs to a protected class and that (2) her employer treated her less favorably in the terms or conditions of her employment (3) than a similarly situated, nonprotected employee, (4) who does substantially the same work. *Washington v. Boeing Co.*, 105 Wn. App. 1, 13, 19 P.3d 1041 (2000) (citing *Johnson v. Dep't of Soc. & Health Servs.*, 80 Wn. App. 212, 227, 907 P.2d 1223 (1996)). If the employee is unable to establish a prima facie case, the employer is entitled to judgment as a matter of law. *Kastanis*, 122 Wn.2d at 490 (citing *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981)).

If the employee establishes a prima facie case, a rebuttable presumption of discrimination arises. *Burdine*, 450 U.S. at 254. The burden then shifts to the employer to provide a legitimate, nondiscriminatory explanation for the adverse employment action. *Burdine*, 450 U.S. at 254-55. If the employer satisfies its burden, the burden shifts back to the employee to show that the proffered explanation is a pretext. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). If the employee cannot show pretext, the employer is entitled to judgment as a matter of law. *Hill*, 144 Wn.2d at 182 (citing *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 365, 753 P.2d 517 (1988)).

1. Removal of Gregg's Authority to Appoint Managers and Authorize Salary Increases

Gregg, a protected employee,<sup>4</sup> claims discrimination because Brimner removed her authority to appoint hospital management personnel and never returned that authority to her.

Gregg may have received less favorable treatment in the terms or conditions of her employment than a similarly situated, non-protected employee doing substantially the same work. *See Boeing*, 105 Wn. App. at 13. The mental health division of the Department has three clinical institutions in Washington: Western, Eastern, and the Child Study and Treatment Center (CSTC). During Gregg's tenure, Eastern's male CEO and CSTC's female CEO performed substantially the same work as Gregg. To establish a prima facie case of sex discrimination, Gregg needs to show that the mental health division treated her differently than it treated Eastern's non-protected male CEO. *See Boeing*, 105 Wn. App. at 13.

Acting on orders from Brown and Brimner, Morris told Gregg that she could appoint management personnel or authorize managers' pay raises only with Brown's and Brimner's approval. Brown's order did not similarly restrict the CEOs of Eastern or the CSTC. And Gregg's supervisors never reinstated her authority to freely appoint Western managers or to authorize salary increases for them. Thus, Gregg presented sufficient evidence to establish a prima facie case giving rise to a rebuttable presumption of discrimination.

But the Department demonstrated that it had legitimate reasons for treating Gregg differently than other comparable CEOs. Braddock froze salaries for all Department managers, including Gregg's superiors in the mental health division and the CEOs of Eastern and the CSTC. Despite the freeze, Western granted pay raises for several managers.

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<sup>4</sup> Women are a protected class in Washington. RCW 49.60.030.

When Brown learned about the unauthorized raises, he revoked Gregg's, Morris's, and Brimner's authority to grant pay raises and to appoint to managerial positions.<sup>5</sup> Yet Western continued to give salary increases that not only violated Braddock's directive, but also violated the mental health division rules requiring Brown's approval for any managerial pay raise of five percent or more.

Gregg offered no evidence that the Department's explanation for removing her authority in these areas was a pretext. *See McDonnell Douglas*, 411 U.S. at 804.

2. Alternate Positions Offered Upon Gregg's Termination

Gregg argues that the Department discriminated against her when Brimner terminated her without offering her an alternate position within the agency as the Department had done with white males.

When Brimner fired Gregg, he told her that "there might be some positions they could offer [her]." CP at 748. At that time, he did not identify a specific position opening within the agency. When Gregg asked if those positions would pay as much as her CEO position, Brimner told her that "whatever the job pays, you would be getting that." CP at 212. A few months later, Gregg wrote Brimner inquiring whether he would offer her another position within the Department. Brimner replied that while he could not offer her a position at the CEO salary level, he "would be happy to discuss employment opportunities within the division." CP at 787. Gregg did not respond to Brimner's reply. Viewed in the light most favorable to Gregg, the record does not support her claim that Brimner discriminated against her by failing to offer her an alternate

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<sup>5</sup> According to John Black, Jr., the Department's senior human resource manager, the only appointing authority Gregg was authorized to exercise was to recommend an appointee to the division director who would then either accept or deny her recommendation.

position within the agency. Rather, the record shows that Brimner several times offered her the opportunity to explore other jobs within the agency.

3. Gregg's and Andrew Phillips's Salaries

Gregg claims she received disparate treatment because the agency refused to grant her a salary increase.

Before Gregg began at Western, she requested a higher salary for the CEO position. But “Brown became angry . . . and told [Gregg] that he did not have the authority to exceed the [set] salary limits.” CP at 755. He also told Brown that he did not see how the lower salary constituted a hardship for Gregg. Gregg claims that Brown’s response amounted to discrimination. Yet the record establishes that the male interim CEO who followed Gregg received the same pay as Gregg. Gregg fails to show that the Department treated her less favorably in the terms or conditions of her employment than similarly situated, non-protected employees doing substantially the same work.

Gregg also contends that the Department discriminated by offering her successor a significantly larger salary. But even if she could establish a prima facie case of discrimination from this fact, the claim fails because the Department had a legitimate, non-discriminatory reason for offering her successor a higher salary and Gregg offers no evidence of pretext.

After Gregg’s termination, Brown wanted to recruit the most qualified person for the CEO position instead of appointing someone from within. The mental health division conducted a national survey of state hospitals and determined that they had to offer at least \$110,000 per year to attract good candidates. Gregg’s permanent replacement started at \$120,000 per year. But Gregg offers no evidence that the Department’s legitimate non-discriminatory reason for the

disparity is a pretext.

4. Andrew Phillips's Autonomy to Run the Hospital

Gregg also claims that the Department has given her successor “complete autonomy to run the hospital” and does not micro-manage him as it did her. Br. of App. at 36. In support, Gregg cites Morris’s deposition testimony that:

Initially, both Karl Brimner and myself . . . at the time when Andrew Phillip[s] came on board, we told him that [appointing a permanent medical director] was a decision he had to make and there was a sense of urgency about doing it and he could chose (sic) whoever he felt most comfortable with.

Br. of Appellant at 36. But Gregg omits the remainder of Morris’s answer that “[he and Brimner] . . . wanted to have . . . [a] right of last refusal, for lack of a better term. The ability to say, No, that won’t work.” CP at 722. Further, the senior human resources manager testified that Phillips also lacks WMS appointing authority. Taken in the light most favorable to Gregg, the record does not support Gregg’s assertion that Morris and Brimner gave Phillips “complete autonomy.”

5. The Department Had Legitimate, Non-Discriminatory Reasons for Terminating Gregg

In Washington, high-level “exempt” employees, such as the CEOs of Western, Eastern, and CSTC, serve at the pleasure of agency heads. *See e.g., McGuire v. State*, 58 Wn. App. 195, 197-98, 791 P.2d 929 (1990). The Department had the authority to terminate Gregg at any time without showing good cause so long as the Department did not discriminate or retaliate against her in the termination. *See Boeing*, 105 Wn. App. at 13; *McGuire*, 58 Wn. App. at 197.

The Department had numerous non-discriminatory reasons for terminating Gregg. Gregg’s superiors were unhappy with the way she handled personnel issues and with the fact that Western managers received raises in violation of the director’s orders. Brimner also testified that

Gregg would often not file timely reports of incidents at Western despite several requests that Gregg do so. The Department was also unhappy with Gregg's failure to successfully implement her plan to change Western's organizational structure; a plan which the current CEO has scrapped. Gregg's superiors also expressed a general lack of confidence in her leadership abilities. Further, Braddock, Brimner, and Brown had concerns that Gregg would not be able to facilitate the mental health division's goal of removing patients from Western and placing them with community providers.

Brimner also directed Gregg to recruit an organizational performance director, and he continuously reminded her for almost two years that he wanted her to fill the position through recruitment. For two years, Gregg failed to initiate the recruitment process and instead suggested that they appoint Dolly Hanson, the acting organizational performance director. When Gregg recommended Hanson, Brimner told her that she was being insubordinate and that he wanted her to recruit for that position. Gregg eventually followed Brimner's directive.

In addition, Brown expressed concern with Gregg's recommendation to promote Green, who had numerous sexual harassment allegations filed against him. Morris also complained of Gregg's performance with respect to delays in implementing certain budget cuts, delays in appointing a permanent medical director, rash decision making, and failure to consider the problems of implementing the no-smoking policy. Despite Morris's concerns, he and Gregg did not have any serious communication problems while she was the CEO. And Braddock said that he believed Gregg should be offered another position in the agency because she was a good employee; she simply did not meet the Department's expectations for the CEO position.

Gregg has not shown that the Department terminated her for pretextual reasons. Gregg argues that she and a co-worker had devised a

plan to alleviate the Department's concerns with the management personnel issues, but the Department's freeze on management personnel actions prevented her from implementing the plan. But according to the senior human resources manager, Gregg implemented the plan shortly after Braddock lifted the freeze. Gregg also contends that she merely followed the Department's rules by refusing to consider the reprimand she issued to Green since it had been removed from his file one year after the incident.<sup>6</sup>

Despite Gregg's claims, a plaintiff cannot create a pretext issue without some evidence that the articulated reason for the employment decision is unworthy of belief. *Sellsted v. Wash. Mut. Sav. Bank*, 69 Wn. App. 852, 859, 851 P.2d 716 (1993). To do this, a plaintiff must show that the reason has no basis in fact, it was not truly a motivating factor for the decision, or that if there are motivating factors, they were not jointly sufficient to justify the decision. *Sellsted*, 69 Wn. App. at 860 n.14. Gregg does not produce evidence showing that any of these circumstances existed. She failed to produce any evidence that the Department directed any alleged harassment toward her because of her sex.

Moreover, when someone is fired by the same decision makers who hired her, a strong inference arises that the decision makers did not discharge her because of any attribute they were aware of at the time of hiring. *Hill*, 144 Wn.2d at 189 (citing *Bradley v. Harcourt, Brace & Co.*, 104 F.3d 267, 270-71 (9th Cir. 1996)). "For a plaintiff to prevail under such circumstances, the evidence must answer an obvious question: if the employer is opposed to employing persons with a certain attribute, why would the employer have hired such a person in the first place?" *Hill*, 144

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<sup>6</sup> The other evidence that Gregg argues establishes a prima facie case of sex discrimination consists of speculation, argumentative assertions that factual issues exist, and facts not relevant to her discrimination claim. See Br. of Appellant at 38-41. We do not consider these arguments. See *Seattle Police Officers Guild*, 151 Wn.2d at 848.

Wn.2d at 189-90.

Brown approved Gregg's appointment to CEO of Western. He also approved her termination. Gregg's evidence fails to rebut this "same hire--fire" inference. *See Hill*, 144 Wn.2d at 189.

We conclude that the trial court did not err in granting the Department's summary judgment motion as to Gregg's discrimination claims. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000) (summary judgment in favor of the employer proper where the record conclusively revealed some nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred).

### III. Hostile Work Environment

A plaintiff establishes a prima facie hostile work environment claim by showing the harassment was (1) unwelcome, (2) because of sex, (3) affected the terms and conditions of employment, and (4) is imputable to the employer. *Antonius v. King County*, 153 Wn.2d 256, 261, 103 P.3d 729 (2004) (citing *Glasgow v. Ga.-Pac. Corp.*, 103 Wn.2d 401, 406-07, 693 P.2d 708 (1985)). The third element requires that the harassment be sufficiently pervasive as to alter the conditions of employment and create an abusive working environment. *Glasgow*, 103 Wn.2d at 406. "Casual, isolated or trivial manifestations of a discriminatory environment do not affect the terms or conditions of employment to a sufficiently significant degree to violate the law." *Glasgow*, 103 Wn.2d at 406.

Gregg argues that the "white male Mental Health Division level of [the Department] directed her actions in procedures, policies,

hiring, firing, personnel matters, and various other areas.” Br. of Appellant at 31. She contends that Brimner created a hostile work environment when he denied her request to send a female and a black male to a conference in her stead. She also asserts that Morris blocked her attempts to discharge Western’s CEO because Morris was the officer’s personal friend. She maintains that the mental health division created a hostile work environment when it micro-managed her and her executive staff. She further contends that the division created a hostile work environment when its directors required her to make severe budget and staffing cuts on short notice and then second-guessed her decisions “based solely on financial and not clinical considerations.” Br. of Appellant at 32. Gregg also claims that the Department created a hostile work environment by “stripping Gregg of her authority to manage the hospital . . . [and] subjecting [her] work and conduct to heightened scrutiny, not offering [her] an assignment or transfer to another position . . . routinely offered to white males, and terminating [her] appointment as CEO . . . and replacing her with a white male.” Br. of Appellant at 33.

Gregg also points to two incidents that occurred at a meeting she did not attend as evidence that her superiors created a hostile work environment. At an executive team meeting, Michael Smith, who chaired the meeting stated, “[S]arcastically and inappropriately ‘Thank you Pandora Dolly,’” (apparently referring to Dolly Hansen) at the conclusion of the discussion addressing Hanson’s concerns about language interpreting services at the hospital. Br. of Appellant at 34. Morris allegedly responded, “[I]f these god damn foreigners would learn to speak English, we wouldn’t have these problems.” Br. of Appellant at 35; CP at 796.

Although inappropriate, Smith’s and Morris’s comments were mild in comparison to conduct other courts have found to create a hostile environment. *See Glasgow*, 103 Wn.2d at 402 (co-worker used abusive language around

females and “touched or fondled” female employees); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 19, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993) (women employees subjected to sexual innuendo, asked to retrieve coins from president’s front pocket, and asked to retrieve objects purposefully tossed on the floor); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 59-61, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986) (bank manager demands sex from, fondles, exposes himself to, and rapes female employee). The incidents Gregg describes are not sufficiently pervasive to alter the conditions of employment and create an abusive working environment. *See Glasgow*, 103 Wn.2d at 406.

Moreover, Gregg offered no evidence that any of the alleged unwelcome harassment was directed at her or anybody else because of their sex. The trial court did not err in dismissing Gregg’s hostile work environment claim.

#### IV. Retaliation

To establish a prima facie case of retaliatory conduct, a plaintiff must show that (1) she engaged in statutorily protected activity and that (2) her employer took an adverse employment action against her in which (3) retaliation was a substantial motivating factor. *Boeing*, 105 Wn. App. at 14 (citing *Delahunty v. Cahoon*, 66 Wn. App. 829, 840-41, 832 P.2d 1378 (1992)).

If Gregg establishes a prima facie case of retaliation, the burden then shifts to the Department to produce admissible evidence of a legitimate reason for the discharge. *Renz v. Spokane Eye Clinic, P.S.*, 114 Wn. App. 611, 618, 60 P.3d 106 (2002) (citing *Grimwood*, 110 Wn.2d at 363-64). If the Department meets this burden of production, the burden shifts back to Gregg to create a genuine issue of fact that the legitimate reason is merely a pretext. *Renz*, 114 Wn. App. at 619.

Gregg claims that the Department fired

her in retaliation for two comments she made to Brimner about potential management conduct that she feared would be viewed as discriminatory. In a March 6, 2003 email, Gregg told Brimner that his directive to have her appoint other employees to permanent management positions while instructing her not to appoint Hanson “will look like [Gregg is] discriminating against [Hanson] because [Hanson] filed a lawsuit charging the administration with discrimination.” CP at 765. In the second incident, Gregg discussed with Brimner a declaration that a Western employee gave attorneys for a pending litigation unrelated to this lawsuit. In an April 18, 2003 email, Gregg told Brimner that Western had no policy requiring an employee to go through his supervisor before writing such a declaration. Gregg also commented that “[r]equiring that an employee inform his supervisor or get his supervisor’s approval [regarding] the contents of the declaration may be construed as harassment. It may be best to check with [another employee] regarding this issue so we know where we stand.” CP at 776.

Assuming without deciding that these incidents could form the basis of a retaliation claim, the claim still fails because, as we have discussed, the Department provided ample non-retaliatory reasons for terminating Gregg, which she has not shown to be pretext.

## V. Defamation

Gregg contends that “[the Department’s] publication of false statements regarding Gregg exposed her to hatred, ridicule, and contempt and deprived her of the ability to earn a living in her chosen profession.” Br. of Appellant at 45. Specifically, she contends that the Department published false statements that implied she had appointed Green, a serial harasser, to the risk manager position and that she was accountable for failing to prevent his alleged sexual harassment.

To survive a defendant’s motion for

summary judgment on a defamation claim, a plaintiff must offer evidence that the defendant, (1) at least negligently, (2) made false statements (3) in an unprivileged communication to a third party and that (4) the communication caused the plaintiff to suffer damages. *Mohr v. Grant*, 153 Wn.2d 812, 822, 108 P.3d 768 (2005) (citing *Mark v. Seattle Times*, 96 Wn.2d 473, 486, 635 P.2d 1081 (1981) and *Herron v. KING Broad. Co.*, 112 Wn.2d 762, 768, 776 P.2d 98 (1989)). In addition, if the plaintiff is a public official or figure, she must establish that the defendant made the allegedly defamatory statement(s) with actual malice, i.e., with knowledge that the statement was false or with reckless disregard of whether it was false. *Clawson v. Longview Publ'g Co.*, 91 Wn.2d 408, 413, 589 P.2d 1223 (1979).

Whether a plaintiff is a public figure is a question of law. *Eubanks v. N. Cascades Broad.*, 115 Wn. App. 113, 122, 61 P.3d 368 (2003) (citing *Clawson*, 91 Wn.2d at 413). The most important factor distinguishing private and public figures is that public figures assume the risk of public scrutiny. *Clawson*, 91 Wn.2d at 414-16. Of secondary importance is the public plaintiff's ease of access to the press. *Eubanks*, 115 Wn. App. at 122. The phrase "public official" applies to "at the very least . . . those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." *Clawson*, 91 Wn.2d at 416 (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 88, 86 S. Ct. 669, 15 L. Ed. 2d 597 (1966)).

Gregg was the CEO of Western, the largest mental institution in Washington. She attended public relation meetings with the Tacoma News Tribune's editorial board. She also produced news releases and made comments to reporters covering issues arising at Western. Because she assumed the risk of public scrutiny, had at least the appearance of control over Western's affairs, and had ready access to the

press, Gregg is a public figure.

Gregg does not offer any evidence establishing that any Department employee acted with actual malice in providing information to the media. And bare allegations of fact, without any showing of evidence, are insufficient to raise a genuine issue of fact for purposes of a motion for summary judgment. *Meissner v. Simpson Timber Co.*, 69 Wn.2d 949, 955-56, 421 P.2d 674 (1966). The trial court did not err in dismissing Gregg's defamation claim.<sup>7</sup>

We affirm the trial court's summary judgment dismissal of each of Gregg's claims.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

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Armstrong, J.

We concur:

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Houghton, P.J.

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Penoyar, J.

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<sup>7</sup> Although Gregg claims to appeal the trial court's dismissal of her False Light claim, she provides no argument for that claim in her appellate brief.